IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, A. D. 1946

No. 915

MILO MOORE, Director of Fisheries of the State of Washington, and DON W. CLARKE, Director of Game of the State of Washington, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

BRIEF OF KENNETH R. L. SIMMONS, AMICUS CURIAE AND ATTORNEY FOR THE QUILLAYUTE TRIBE OF INDIANS

KENNETH R. L. SIMMONS,
Attorney for Quillayute Tribe of Indians.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent and show:

STATEMENT

The Quillayute Tribe of Indians has requested Kenneth R. L. Simmons, attorney at law of Billings, Montana, and a member of the bar of the Supreme Court of the United States, to file a brief in the capacity of amicus curiae and

as its attorney, in answer to the petition for writ of certiorari to the United States Circuit Court of Appeals, Ninth Circuit, filed in the Supreme Court of the United States in the above captioned case by Milo Moore, Director of Fisheries of the State of Washington and Don W. Clarke, Director of Game of the State of Washington, through their counsel of record.

The interests of the Quillayute Tribe of Indians are so great in this litigation—their very existence being at stake —(R. 207, 210), that they employed said attorney to appear in the capacity of amicus curiae and attorney for the Quillayute Tribe of Indians in the appeal of said cause and the argument thereof before the United States Circuit Court of Appeals for the Ninth Circuit, Moore v. United States, 157 F. 2d, 760, because of his familiarity with the litigation by reason of his participation in the trial of said cause before the United States District Court for the Western District of Washington, Southern Division, when serving as District Counsel, Office of the Solicitor, Department of the Interior, United States v. Moore, 62 F. Supp. 660.

In pursuance of the provisions of Section 9 of Rule 27 of the Revised Rules of the Supreme Court of the United States, this brief of an amicus curiae is filed, written consents thereto having been obtained from all parties to the case and separately filed with this brief with the clerk of the Supreme Court of the United States.

The position here taken is that the application for writ of certiorari should be denied for reasons set forth in the ensuing argument.

SUMMARY OF ARGUMENT

I

The United States Circuit Court of Appeals for the Ninth Circuit in its decision in the instant case, Moore, Director of Fisheries, State of Washington, et al., v. United States, 157 F. 2d 760, expressly overruled its decision in the case of Taylor et al., v. United States, 44 F. 2d 531, and there are now no conflicting opinions of the United States Circuit Court of Appeals for the Ninth Circuit relating to the subject matter of this controversy.

II

The denial of the government's petition for writ of certiorari by this court in the case of United States v. Taylor, et al., 283 U. S. 820, 51 S. Ct. 345, 75 L. Ed. 436, advances no reason for the granting of a writ of certiorari by this court in the instant case.

III

No new question of federal law arises as a result of this controversy which has not been settled by this court. The decision of this court in the case of Alaska Pacific Fisheries v. United States, 248 U. S. 78, 39 S. Ct. 40, 63 L. Ed. 138, is controlling and determinative of all questions involved.

ARGUMENT

I

The decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of the United States v. Taylor, 44 F. 2d 521, was based clearly upon a factual error. It is evident that Justice Wilbur, who wrote the opinion, was under the impression that the State of Wash-

ington had been admitted into the Union before the Quillayute Indian reservation was set aside by Executive Order on February 19, 1889, while as an historical fact Washington was not actually admitted until November 11, 1889, and the enabling act, authorizing its admission into the Union, was passed three days after the reservation was created, on February 22, 1889, 25 Stat. 676.

The trial court stated in its opinion, United States v. Moore, 62 F. Supp. 660, 664:

> "An examination of the opinion, however, discloses that the Court did not, in the opinion, review the 'surrounding circumstances,' nor the 'history leading up to the promulgation of the instrument,' but turned its decision of the case upon the 'previously vested rights of a state,' and based it upon the mistaken fact that the creation of the State of Washington was prior to the creation of the Indian Reservation, which resulted in the conclusion that the State had vested rights. This court must consider the facts as made by the proof and determine the rights of the parties based upon such proof."

An examination of the opinion of the United States Circuit Court of Appeals for the Ninth Circuit in the instant case, discloses, without any question, that the Circuit Court recognized its factual error and expressly overruled its decision in the Taylor case, by stating in its opinion, Moore v. United States, 157 F. 2d. 760, 764:

> "As to stare decisis, this court made a controlling error in political history. It based its opinion upon a statement that Washington entered the Union before the reservation was made. As a result of this error our Taylor opinion states, at pages 534, 535, '* * * If we recognize the rule that in grants to Indians uncertainties are to be determined more favorably to them than to the government, we must here recognize that the governmental act is dual in its effect, if so con-

strued, as it takes from the state a right already expressly granted to it and reserves it for a political body, not by express grant or reservation, but by mere implication. In other words, so construed, the act of the President extends to a political body, merely because it is a political body, a right which must be taken from another political body to which it has been already expressly granted. It would seem more reasonable that the previous express grant to a political body would take precedence **over the implications which would otherwise** arise from the reservation of the upland for an Indian tribe. We are inclined to think that **the inferences to be derived from the fact that the Quileute Indians for whom the reservation was set apart** are overcome by the prior express grant of the tidelands and navigable waters to the state.' (Emphasis supplied.) To such a decision, based upon such an error of fact judicially to be noticed, the doctrine of stare decisis cannot apply. We have considered 'the inferences to be derived from the fact that the Quileute (Quillayute) Indians for whom the reservation was set apart' in view of the fact that the state was admitted to the Union **after** the land was set apart to the Indians, and have come to the above conclusion."

It is submitted that there are no conflicting opinions of the United States Circuit Court of Appeals relating to the subject matter of this controversy. The subject matter of this controversy, as stated by the United States Circuit Court of Appeals for the Ninth Circuit, 157 F. 2d., 760, 762, is:

> "Whether in creating the reservation the United States reserved only the bed of the river at its mouth and the adjoining ocean beach lands, or did it reserve the river's bed for the remaining area within the upland of the reservation and the Pacific tidal waters on the ocean side of the barren sandspit?"

In the Taylor case the question involved was whether the State of Washington held title to the bed of a navigable

stream by virtue of its statehood, which bed of the Quillayute River had or had not been set aside prior to the admission of Washington into the Union. The Circuit Court of Appeals had the courage to admit its factual error which controlled its decision.

II

The fact that this court denied the government's petition for writ of certiorari in the case of United States v. Taylor, et al, can have no bearing whatsoever upon the action taken by this court in the consideration of the present application for a writ of certiorari. In the Taylor case the record failed entirely to disclose the circumstances of the case; that is to say, the conditions of the Quillayute Indians at the time the Executive Order was issued on February 19, 1889, by President Cleveland establishing the reservation. As the trial court stated in referring to the opinion of the United States Circuit Court of Appeals in the Taylor case, 62 F. Supp. 660, 664:

> "An examination of the opinion, however, discloses that the Court did not, in the opinion, review the 'surrounding circumstances,' nor the 'history leading up to the promulgation of the instrument,' but turned its decision of the case upon the 'previously vested rights of a state,' * * * * This court must consider the facts as made by the proof and determine the rights of the parties based upon such proof."

All of this evidence as to the surrounding circumstances and history of the Quillayutes was before the trial court and the Circuit Court in the instant case.

III

No new question of federal law not settled by this court arises out of this controversy. The principles recognized

in the case of Alaska Pacific Fisheries v. United States, 248 U. S. 88, 39 S. Ct. 41, are absolutely controlling in determining the intent of the grantor as to the lands and waters set aside by the Executive Order of February 19, 1889. The United States Circuit Court of Appeals for the Ninth Circuit, in its opinion, stated, 157 F. 2d., 760, 762:

> "We consider the principles recognized in the Alaska Pacific Fisheries case as controlling here. There, in determining the purposes of the reservation of the Annette Islands with reference to the sufficiency of the wants of the Metlakahtla Indian Tribe, the primary purpose was stated to be to aid the Indians who were 'largely fishermen and hunters accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a **promising** opportunity for industrial and commercial development.' (Emphasis supplied.) Alaska Pacific Fisheries v. United States, supra, 248, U. S. 88, 39 S. Ct. 41."
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> * * * * "It is the consideration of such circumstances which determines the government's intent in making a reservation, whether by a Congressional Act as in the Alaska Fisheries case or a departmental reservation as in our decision in United States v. Walker River Irrigation District, 9 Cir., 104 F. 2d, 334, 335."
>
> "We think President Cleveland, for the protection and expansion of their established industries, intended and did reserve to these Indians the sandspit, including its tidal lands, and the bed and waters of the Quillayute River, not only by the express reservation of its mouth, but also for the mile upwards from its mouth enclosed by the reservation lands, and that this area is not one to which apply the fish and game laws of the State of Washington. Cf. Donnelly v. United States, 228 U. S. 243; 33 S. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710; Heckman v. Sutter, 9 Cir., 119 F. 83, 89; United States v. Romaine, 9 Cir. 255, F. 253, 259."

There can be no more question here than in the Alaska

Pacific Fisheries case that it was clearly the intent of Congress as well as the President to include the submerged lands and waters in the legislative grant and Executive Order; otherwise the terms of the grant and the Executive Order would have been meaningless. The Quillayute Indians without the submerged lands and adjacent waters could not possibly exist. Their condition was and always has been many times more pitiful than that of the Metlakahtla Indians. Congress as well as the President clearly had power to include the adjacent waters and submerged lands in the reservation without expressly so stating in the grant or order. The words of this Court in the Alaska Pacific Fisheries case, 248 U. S. 78, 87; 39 S. Ct. 41, leave no room for argument on this proposition:

> "That Congress had power to make the reservation inclusive of the adjacent water and submerged lands as well as the uplands needs little more than statement. All were the property of the United States within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. National Bank v. County of Yankton, 101 U. S. 129, 133, 25 L. Ed. 1046; Shively v. Bowlby, 152 U. S. 1, 47-48, 58, 14 Sup. Ct. 548, 38 L. Ed. 331; United States v. Winans, 198 U. S. 371, 383, 25 Sup. Ct., 662, 49 L. Ed. 1089. The reservation was not in the nature of a private grant, but simply a setting apart,' until otherwise provided by law,' of designated public property for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States. See United States v. Kagama 118, U. S. 375, 379, et seq., 6 Sup. Ct. 1109, 30 L. Ed. 228; United States v. Rickert, 188 U. S. 432, 437, 23 Sup. Ct. 478, 47 L. Ed. 532."

It is respectfully submitted that the application of the petitioners for writ of certiorari should be denied.

Dated at Billings, Montana, this 5th day of February, 1947.

KENNETH R. L. SIMMONS
As Amicus Curiae and Attorney
for the Quillayute Tribe of Indians.